RECENT ENGLISH DECISIONS.

In the Court of Common Pleas.

WALMSLEY AND ANOTHER, ASSIGNEES OF MOORE, A BANKRUPT *vs.* MILNE.

1. A, mortgages to B, a piece of ground; afterwards, A, still continuing in possession, erects on the land certain buildings, in which he puts up a steam-engine, hay-cutter, corn-crusher, malt-mill, and mill-stones, &c., all, except the stones, affixed to the freehold, but in such a way as to be removable at pleasure, without injury to the buildings or to themselves. A, then becomes bankrupt: Held, by two judges, (dissentiente Willes, J.) that although the articles above mentioned were removable, and were put up with a view to the better carrying on of A.'s trade or calling, yet, being put up with the object of permanently improving the inheritance, they were therefore fixtures, and did not pass to the assignees of A. on the bankruptcy.
2. The relation between mortgagor in possession and mortgagee is not that of tenant for years and landlord; therefore, assuming the above to be trade fixtures, they were not removable, as such, by A., and therefore did not, in that view, pass to his assignees, there being no evidence of any intention, as between A. and B., that articles fixed to the freehold by A, subsequent to the mortgage, should not become part of the mortgaged estate.

The plaintiffs sued as assignees of one Moore, a bankrupt, for that the defendant detains from the plaintiffs, as assignees, &c., their goods, chattels, effects, and fixtures, that is to say, steam engine, boiler, pipes, a hay cutter, corn crusher, grinding stones, and iron pillars, of the value, &c. Pleas, first, *non detinet;* secondly, that the said goods, &c., were not nor are, nor were nor are any of them, or any part thereof, the goods, &c., of the plaintiffs, as assignees, &c. Issues thereon. The writ was issued out of the Court of Common Pleas at Lancaster, and the cause having come on for trial, before Byles, J., at the Spring Assizes at Liverpool, 1859, a verdict was found for the plaintiffs for £80, with leave to move to enter the verdict for the defendant, in case the court should be of opinion that the articles mentioned above were fixtures. A rule was obtained calling on the plaintiffs to show cause why the verdict for them should not be set aside, and a verdict entered for the defendant, on the ground that the property in question at the trial was part of the freehold, and did not vest in the plaintiffs, as assignees, &c. It

appeared that the steam engine rested on four iron beams, the ends of which were fixed in the wall of a building, the feet of the engine being screwed down on the beams by means of iron bolts and nuts, on removing by unscrewing which, the engine might be taken away without doing any injury to the building. The hay cutter was fixed by its feet in a similar way, with screw bolts, to the floor of a room, and on the removal of the nuts, by unscrewing, the hay cutter could be taken away without any injury to the building or the floor. The corn or malt crusher was in the same room, resting on two iron brackets, and being fixed to them, the brackets being fixed to the wall by screw bolts. There is an iron plate outside the wall to hold the bolts, which pass through the wall. On unscrewing the nuts which fasten them, the bolts are capable of being taken out, when the crusher can be removed off the brackets, and no injury is thereby done to the building. The grinding stones were in a room over a coach house, the floor of which has required strengthening to carry them, and the pillars in question support it. The pillars are screwed both to the floor on which they stand and to that which they support. Neither of the stones are fixed at all. There is a strong rim or hoop fixed on the floor of the upper room, into which the lower stone is dropped, and in which it works, the upper stone being placed upon it, and both could be taken out without disturbing anything. The claims as to the boiler and pipes were given up at the trial. It was proved that these articles were all used by the bankrupt in the way of his trade, and that the steam engine was used to bring sea water through the pipes, to some baths which the bankrupt kept for letting, for the use of the public. The engine was proved to be a portable one, being capable of being carried from place to place, set up anywhere, and of being removed, without being taken to pieces. The defendant was mortgagee of the premises in which these articles stood, being alleged to be part of the premises mortgaged to him by the bankrupt, by a deed dated the 17th February, 1853. The bankruptcy took place on the 4th September, 1858. The engine, and the stones and other articles, were placed on the premises subsequent to the mortgage. On the 20th August, 1858, the premises were sold, in lots, and the defendant purchased the buildings in which the above mentioned articles were placed.

Wilde, Q. C., and *Milward*, for the plaintiffs, now showed cause. First, these are not fixtures, not being permanently attached to the freehold as part of it. Secondly, they are trade fixtures, if fixtures at all, and therefore removable. The case will not be found to turn on the terms of the mortgage deed, for these fixtures were not in existence at the date of the deed, as far as the mortgage is concerned. *Hellawell* vs. *Eastwood*, 6 Exch. 295, is in point for us. The bankrupt carried on the business of a bath-keeper, and also an hotel-keeper; the steam engine was used for the purposes of the baths, principally for supplying sea-water to them; and all the other things were used for one or other of his two trades. They were each removable *salvè et commodè*, without injury to themselves or to the buildings, being fixed on by screws only, somewhat larger than the nails or screws ordinarily used to fix down a carpet; and therefore the case falls within the rule in *Hellawell* vs. *Eastwood*. Though that case arose between landlord and tenant, it is treated by the court on perfectly general grounds, and therefore the proposition laid down in it applies here. There Parke, B., says, "they would not have passed by a demise of the mill." That is precisely this case. *Hellawell* vs. *Eastwood*, was followed in *Waterfall* vs. *Penistone*, 6 El. & Bl. 880. That was an action by the mortgagee against the assignees of a mortgagor who had become bankrupt, and is very similar to this case. *Trappes* vs. *Harter*, 2 Cr. & M. 178, is also in point. What the court will be asked by the other side to hold, in effect, is, that all machinery fixed up in factories throughout Lancashire passes to the landlord. If the decision be in favor of the defendant, it will defeat the very object of the mortgagor. They cited *Marter* vs. *Bradley*, 2 Moo. & Sc. 25; *Wilde* vs. *Waters*, 16 C. B. 202; *Minsall* vs. *Lloyd*, 2 M. & W. 450; *Boydell* vs. *M'Michael*, 1 C. M. & R. 177; and *Coombs* vs. *Beaumont*, 5 B. & Ad. 72.

Atherton, Q. C., in support of the rule, cited *Mather* vs. *Frazer*, 25 L. J. Ch. 361; *Colegrave* vs. *Dias Santos*, 2 B. & Cr. 76; and *Richmond* vs. *Waters*, 4 Exch. 79. CROWDER, J.—In Shep. Touch. 89, it is said, "by the grant of mills, the waters, flood-gates, and the like, that are of necessary use to the mills, do pass." BYLES, J.

In the last edition of Amos & Ferard on Fixtures, it is pointed out that the court came to the decision in *Trappes* vs. *Harter*, on the very peculiar circumstances of that case. WILLES, J.—In the report of *Wilde* vs. *Waters*, in the Law Journal, it is said that *Trappes* vs. *Harter* has been remarked on.

Cur. adv. vult.

Nov. 11.—CROWDER, J., now delivered the judgment of the court.[1] This was an action by the assignees of a bankrupt to recover from the defendant certain articles alleged to be part of the bankrupt's estate. It was tried before my brother Byles, at the last Liverpool Spring Assizes, when a verdict was found for the plaintiffs, with liberty to move to enter the verdict for the defendant. The facts were these: Moore, the bankrupt, being the owner of a vacant lot of ground, in 1853 mortgaged it in fee to one Oswald, who, in August, 1858, sold to the defendant the mortgaged premises. Moore became a bankrupt in September, 1858. Subsequently to the mortgage, and before the sale in 1858, Moore, who had always continued in possession, erected various buildings upon the plot of ground, and set up all the articles sought to be recovered in this action. They consisted of a steam engine and boiler, used for the purpose of supplying with salt water the baths which had been erected on the premises; also a hay cutter and malt mill, a corn crusher and grinding stones, all (except the grinding stones) being screwed with bolts and nuts, or otherwise firmly affixed to the several buildings to which they were attached, but still in such a manner as to be removable without damage to the buildings, or to the things themselves. The upper mill stone lay in the usual way, upon the lower grinding stone. All the fixtures were put up for the purpose of trade. The rule was argued before my brothers Willes and Byles, and myself; and in the course of the argument a great many cases were cited, which we desired time to consider before delivering our judgment. On the part of the plaintiffs it was contended, first, that the articles in question were not fixtures at all, because not permanently attached to the freehold, but simply movable chattels, which therefore passed to the assignees of the

[1] Crowder, Willes, and Biles, J. J. But see the end of the report.

bankrupt; or, secondly, that, if fixtures, they were trade fixtures, and therefore removable by the bankrupt, and so would pass to his assignees. The case of *Hellawell* vs. *Eastwood*, 6 Exch. 295, was cited in support of the first proposition. There, cotton spinning machines, called mules, had been distrained for rent; and the question was as to the validity of the distress. It appeared that these mules were fixed by means of screws, some into the wooded floor, some into lead, which had been poured in a melted state into holes in stones for the purpose of receiving the screws; and it was considered by the Court of Exchequer, as a question of fact, whether the machines so fixed were parcel of the freehold. It was said, that whether a chattel attached to the soil was a fixture was always a question of fact, depending upon the circumstances of each case, and principally on two considerations, first, the mode of annexation to the soil or fabric of the building, and whether it would be easily removed without injury to itself or the building; and, secondly, the object of the annexation, whether for the permanent and substantial improvement of the dwelling, or merely for a temporary purpose, and the more complete enjoyment and use of it as a chattel. The judgment of the court proceeded upon both considerations: they said that the mules never became part of the freehold, as they were only attached slightly, and could be easily removed without any damage; "and the object and purpose of the annextion was, not to improve the inheritance, but merely to render the machinery steadier, and more capable of convenient use as chattels." Now, without expressing any opinion upon that case, it is sufficient, upon the present occasion, to observe, that assuming it to be well decided, it is no authority for holding that the disputed articles in the case at bar are not fixtures, forming part of the freehold; for we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold, for the purpose of improving the inheritance, and not for any temporary purpose. The bankrupt was the real owner of the premises, subject only to a mortgage, which vested the legal title in the mortgagee until the repayment of the money borrowed. The mortgagor first erected baths, stables, and coach-house, and other buildings, and then supplied them with the fixtures in question for their permanent improvement. As to the steam engine and boiler, they

were necessary for the use of the baths. The hay cutter was fixed into a building adjoining the stable, as an important adjunct to it, and to improve its usefulness as a stable. The malt mill and grinding stones were also permanent erections, intended by the owner to add to the value of the premises. They, therefore, resemble in no particular (except being fixed to the building by screws) the "mules" put up by the tenant in the case of *Hellawell* vs. *Eastwood*. But, secondly, it was contended, on the part of the plaintiffs, that, assuming the articles in question to have been so affixed as not to be removable, according to the general rule of law, yet that as they were trade fixtures they might be removed, and so would pass to the bankrupt's assignees. The whole of the plaintiffs' argument upon this head was founded upon the well-established exception to the general rule, that where a tenant puts up fixtures for the purpose of trade during his term, he may, before its expiration, without the consent of his landlord, disunite them from the freehold. The defendant's counsel were quite ready to admit the validity of the numerous authorities supporting that proposition, and to concede to the plaintiffs, that if the bankrupt had been tenant to the mortgagee for a term, and the bankruptcy had happened before its expiration the fixtures in question were such as would have passed to the assignees; but they denied that any such tenancy existed in the present case. And this leads us to the consideration of the peculiar relationship existing between a mortgagor in possession and the mortgagee, which it is really difficult to express in any other legal terms. A mortgagor in possession has been called sometimes a tenant at will to the mortgagee, or a tenant at sufferance, or like a tenant at will; but he has never been designated as tenant for any term. Lord Ellenborough, in *Thunder* vs. *Belcher*, 3 East, 440, called him a tenant at sufferance; and Lord Tenderden, in *Doe* vs. *Maisey*, 8 B. & Cr. 767, said, "the mortgagor is not in the situation of tenant at all, or, at all events, he is not more than tenant at sufferance, but in a peculiar character, and liable to be treated as tenant, or as trespasser, at the option of the mortgagee." He is clearly not a tenant at will, because he may be ejected without any notice or demand of possession, and is not entitled to the growing

crops. All the cases, therefore, which show that where a tenant for years has put up trade fixtures, he may remove them before his tenancy expires, have no application to the case at bar. But two cases of mortgagee and mortgagor in possession were cited by the plaintiffs' counsel as strongly supporting their clients' title to the verdict. One was *Trappes* vs. *Harter*, 2 Cr. & M. 153, decided by the Court of Exchequer, in which Lord Lyndhurst delivered the judgment of the court; and the other, *Waterfall* vs. *Penistone*, 6 El. & Bl. 876; S. C. 1 Jur. N. S. 27, in which our present Chief Justice (then Mr. Justice Erle, delivered the judgment of the Court of Queen's Bench. *Trappes* vs. *Harter*, was a decision in favor of the assignees of a bankrupt mortgagor in possession, upon the ground that the mortgage did not pass the fixtures in question, and was not intended by the parties to pass them. The mortgage enumerated various fixtures, but did not refer to the fixtures in dispute; and this omission, together with the other circumstances in the case, induced the court to be of opinion that they were intentionally omitted in the mortgage deed, and therefore did not pass by it. That case, then, "must be regarded as having been decided on its own peculiar circumstances," as stated in the note appended to it, and cannot be taken as an authority to govern us in the case before us. The other case, of *Waterfall* vs. *Penistone*, was also that of a bankrupt mortgagor in possession and a mortgagee, where the question was, whether the bill of sale of the fixed machinery, drawn in the shape of a mortgage, required registration under the 17 & 18 Vict. c. 36. This partly involved the consideration as to whether the fixtures were to be deemed goods and chattels within that act; and *Hellawell* vs. *Eastwood* was cited in the argument, and recognized as a valid authority by the court. But the species of mortgage was of a peculiar description. There had been a prior mortgage of the premises, with the fixtures then thereon; afterwards, for a further consideration, a mortgage was made of the fixtures, which had been subsequently annexed, by themselves; and the court was of opinion that they did not pass by the prior mortgage, because the tenor of the instrument showed that the parties did not so intend, and they held that the separate mortgage of these fixtures was

within the 17 & 18 Vict. c. 36, requiring the deed to be registered; and for want of such registration, they decided that the fixtures passed to the assignees. In the present case, however, there do not appear any circumstances tending to show an intention existing between Moore, the bankrupt, and his mortgagee, that the fixtures annexed, subsequently to the date of the mortgage, should not become part of the mortgaged estate; and in the absence of such intention, the current of authorities in the Bankruptcy court shows that such an annexation of fixtures would enure to the benefit of the mortgagee. In *Ex parte Belcher*, 4 Deac. & C. 703, which was decided in the Court of Review in 1835, it was held, that fixtures annexed to the freehold, after the mortgage by the mortgagor in possession, and which, as between landlord and tenant, would have been removable if put up by the tenant, became part of the freehold, and did not pass to the assignees of the bankrupt mortgagor. The chief judge (afterwards Mr. Justice Erskine,) there says, after adverting to the relaxation of the general rule of law in favor of trade fixtures put up by tenants, "But that is not the present case. Again: it is said that the property in question did not pass by the mortgage deed. Now, it always appeared to me, that where the owner of the inheritance affixes property to it, it becomes a fixture, in the general sense of the term, and part of the freehold; and if the inheritance be afterwards sold or let, it goes with the freehold; and I confess I see no distinction, for this purpose, whether the deed be one of absolute conveyance, lease, or mortgage. A mortgage, therefore, made by the owner of the inheritance, will, without naming them, pass all the fixtures thereon." And in another part of his judgment he says, "Again: it is urged, that as to those articles which were attached after the execution of the mortgage deed, they could not pass to the mortgagee; but there has not been cited any authority, or even dictum, for such a proposition. I confess I know no case which goes so far as to determine, or even to intimate an opinion, that where a mortgagor in possession alters the premises, by addition or otherwise, the mortgagee shall not take the benefit of such alteration. I can find no distinction, therefore, substantially between those which were affixed before and those affixed after the date of

the mortgage deed. In that point of view, also, I am of opinion that all the fixtures alike passed to the mortgagee." There is also a very elaborate and learned judgment of Mr. Commissioner Holroyd, reported in 2 M. D. & De G. 443, 1841, in which the whole subject is fully considered, and a similar opinion very clearly expressed. To the same purport are the decisions in the Court of Review: *Ex parte Broadwood*, 1 M. D. & De G. 631, 1841; *Ex parte Price*, 2 M. D. & De G. 518, 1842; *Ex parte Bentley*, Id. 591, 1842; *Ex parte Cotton*, Id. 725, 1842; *Ex parte Tagart*, De Gex, 531, 1847. The effect of annexing fixtures, of a similar character to those in the present case, by the owner of the inheritance, was much discussed in the House of Lords in the Scotch case of *Fisher* vs. *Dixon*, 12 Cl. & Fin. 312. There the question was considered as if arising between the heir and executor, and Lords Brougham, Cottenham, and Campbell delivered very decisive opinions in favor of the heir. The subject-matter of the annexation in that case was steam engines and machinery for the purpose of working an iron mine. Lord Cottenham, after having dismissed, as wholly inapplicable, the cases of landlord and tenant, says, "The case being simply this, the absolute owner of the land having erected upon, and affixed to, the freehold, and used for the purpose of the beneficial enjoyment of the real property, certain machinery, the question is, is there any authority for saying, that under these circumstances the personal representative has a right to step in and lay bare the land, and to take away all the machinery necessary for the enjoyment of the land?" He answers, "Although machinery is, in its nature, generally personal property, yet, with regard to machinery or a manufactory erected upon the freehold, for the enjoyment of the freehold, nobody can suppose that can be the rule of law; and so with respect to other erections upon land. It is not necessary to go beyond the present case, which is a case of machinery erected for the better enjoyment of the land itself." In *Mather* vs. *Frazer*, 2 Kay & J. 536, which was a case of a bankrupt mortgagor in possession, and mortgagee, decided by Sir W. P. Wood, V. C. in 1856, *Fisher* vs. *Dixon*, was, amongst numerous other cases, cited before the Vice-Chancellor. In giving judgment, the Vice-Chancellor says, "They

(the mortgagors) conceived that the most profitable purpose for which they could use the land would be the business of copper roller manufacturers. I apprehend, therefore, that the case comes clearly within that of machinery affixed to land, by the owner of the land, for the purpose of better and more beneficially using and enjoying the land of which he is the owner; and although the means of such use and enjoyment be manufacture or trade, still I am of opinion that all such of the articles in question as are affixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, are within the authority of *Fisher* vs. *Dixon*, partake of the nature of the soil, and would have descended to the heir along with and as part of the soil itself." These later decisions are in accordance with the earlier cases of *Winn* vs. *Ingilby*, 5 B. & Ad. 625; *Colegrave* vs. *Dias Santos*, 2 B. & Cr. 76; *Reg.* vs. *The Inhabitants of St. Dunstan*, 4 B. & Cr. 686; and *Place* vs. *Fagg*, 4 Man. & R. 277. In *Winn* vs. *Ingilby*, it was held, that certain articles, consisting of set pots, ovens, and ranges, fixed up by the owner of a house, would go to the heir, and not to the executor, and could not therefore be seized under a fieri facias against the owner. In *Colegrave* vs. *Dias Santos*, in which there was a question whether stoves, shelves, brewing vessels, locks, blinds, &c., passed to the purchaser of a house, upon the sale and conveyance of the house, the court said, that some of the articles, namely, the stoves, cooking coppers, mash-tubs, water-tubs, and blinds, might be removable, as between landlord and tenant, but would not belong to the executor, but to the heir, and were, as between those persons, parts of the freehold. In *Reg.* vs. *The Inhabitants of St. Dunstan*, BAYLEY, J., said, that stoves, grates, and cupboards were parcel of the freehold, and though they might be removed by a tenant during his term, yet they would go to the heir, and not to the executor. And in *Place* vs. *Fagg*, the property in question was the stones, tackling, and implements necessary for the working of a mill. There had been a mortgage of the mill, and it was held, that by that mortgage, the stones, tackling, and implements necessary to the working of the mill, passed to the mortgagee. And we may observe here, in reference to a point made by one of the

learned counsel for the plaintiffs, that, at all events, the verdict must be for the plaintiffs for the upper mill-stone; that *Liford's case*, 11 Rep. 50, citing *Wiston's case*, Year Book, 14 Hen. 8 fol. 25, B. disposes of that point. The law is correctly stated in Amos & Ferard on Fixtures, 257, where, in speaking of things constructively annexed to the freehold, they mention a mill-stone, "which, though not annexed to the freehold, is yet essentially parcel of the mill." We think, therefore, that when the mortgagor, (who was the real owner of the inheritance,) after the date of the mortgage, annexed the fixtures in question for a permanent purpose, and for the better enjoyment of his estate, he thereby made them part of the freehold which had been vested by the mortgage deed in the mortgagee, and that consequently the plaintiffs, who are assignees of the mortgagor, cannot maintain the present action. The verdict therefore, must be entered for the defendant. *Rule absolute.*

Nov. 12, CROWDER, J. stated that he was desired by WILLES, J. to say, that that learned judge entertained serious doubts whether the articles were not chattels.

NOTICES OF NEW BOOKS.

COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE, FOREIGN AND INLAND, AS ADMINISTERED IN ENGLAND AND AMERICA; With occasional Illustrations from the Commercial Law of the Nations of Continental Europe. By JOSEPH STORY, LL.D., one of the Justices of the Supreme Court of the United States, and Dane Professor of Law in Harvard University. Fourth edition, revised, corrected, and enlarged. Boston: Little, Brown & Co. 1860. pp. 642.

Judge Story's books do not seem to lose favor with the profession. In the volume before us, we have the *fourth* edition of Bills of Exchange. Perhaps the commercial lawyer is more frequently called on to advise upon this subject than any other, and good books of easy reference are most important. The learning of bills of exchange has exercised the talent of the bar, in its intricate and complicated doctrines, from an early period in the history of commerce, and it so happens that good books have always been on our shelves. Baron Bayley's work is still used, and a *tenth* edition of Chitty, attests its excellence, to say nothing of a *seventh* edition of Byles's admirable treatise.

This edition of Story on Bills is very complete; it has all the accumu-